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BALLOT PROPOSAL  
06-4

An Overview

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## **PROPOSAL 06-4**

On November 7, 2006, Michigan voters will decide whether to amend the State Constitution, to provide that the taking of private property by a governmental entity for transfer to a private entity for the purpose of economic development or enhancement of tax revenue would not be considered to be for public use. Proposal 06-4 is the result of Senate Joint Resolution E, which was approved by the Legislature in 2005. The following language will appear on the ballot:

### **A PROPOSED CONSTITUTIONAL AMENDMENT TO PROHIBIT GOVERNMENT FROM TAKING PROPERTY BY EMINENT DOMAIN FOR CERTAIN PRIVATE PURPOSES**

*The proposed constitutional amendment would:*

- *Prohibit government from taking private property for transfer to another private individual or business for purposes of economic development or increasing tax revenue.*
- *Provide that if an individual's principal residence is taken by government for public use, the individual must be paid at least 125% of property's fair market value.*
- *Require government that takes a private property to demonstrate that the taking is for a public use; if taken to eliminate blight, require a higher standard of proof to demonstrate that the taking of that property is for a public use.*
- *Preserve existing rights of property owners.*

*Should this proposal be adopted?*

### **Proposed Constitutional Amendment**

Article X, Section 2 of the State Constitution prohibits the taking of private property for public use without just compensation first being made or secured in the manner prescribed by law. Proposal 06-4 would amend Article X, Section 2 to provide that "public use" would not include the taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenue. Private property otherwise could be taken for reasons of public use as that term was understood on the effective date of the constitutional amendment. In a condemnation action, the burden of proof would be on the condemning authority to demonstrate, by a preponderance of the evidence, or, if the taking were for the eradication of blight, by clear and convincing evidence, that the taking was for a public use. The amendment provides that any existing right, grant, or benefit afforded to property owners as of November 1, 2005, whether provided by Section 2, by statute, or otherwise, would not be abrogated or impaired by the constitutional amendment.

### **Background**

#### *County of Wayne v Hathcock (471 Mich 445)*

In 2004, the Michigan Supreme Court issued its opinion in this case overturning its 1981 decision in *Poletown Neighborhood Council v Detroit*, which had allowed the condemnation and transfer of private property to a private entity for the purpose of economic development. Several years ago, Wayne County initiated condemnation proceedings against 19 property owners who refused to sell their land for the construction of a large business and technology park. The property owners argued that the condemnations violated the State Constitution because the project would not serve a public purpose. The trial court and, subsequently, the Court of Appeals, citing the 1981 *Poletown* decision, affirmed the county's position, and the property owners appealed to the Michigan Supreme Court.

The Court pointed out it was well established that the constitutional "public use" requirement was not an absolute bar against the transfer of condemned property to private entities, but it did work to prohibit the State from transferring condemned property to private entities for a *private*

use. Accordingly, the Court concluded that the transfer of condemned property is a “public use” if it possesses one of three following characteristics:

- A “public necessity of the extreme sort” is involved and addresses a specific need: “enterprises generating public benefits whose very *existence* depends on the use of land that can be assembled only by the coordination central government alone is capable of achieving”, e.g., highways, railroads, and other instrumentalities of commerce.
- The acquiring private entity “remains accountable to the public in its use of that property”, and the land “...` will be devoted to the *use* of the public, *independent of the will of the corporation taking it.*”
- The land to be condemned “...must be selected on the basis of ‘facts of independent public significance,’ meaning that the underlying purposes for resorting to condemnation, rather than the subsequent use of condemned land, must satisfy the Constitution’s public use requirement.”

The Court determined that the proposed condemnations did not satisfy any of these criteria and thus were unconstitutional. The Court also noted that *Poletown* was the first case in which it was held that a private entity’s pursuit of profit amounted to “public use” because of the residual benefit to the economy. The Court pointed out that virtually any exercise of eminent domain power on behalf of a private entity could be rationalized on the basis of economic benefit. For these reasons, the Court overruled *Poletown*.

#### Kelo v City of New London, Connecticut

In this 2005 opinion, the U.S. Supreme Court addressed whether the City of New London’s proposal to use the power of eminent domain to acquire the property of unwilling property owners for a city development plan qualified as a “public use” within the meaning of the Takings Clause of the Fifth Amendment to the U.S. Constitution. The Court noted that it historically had afforded “...legislatures broad latitude in determining what public needs justify the use of the takings power.” In this case, the city had invoked a state statute specifically authorizing the use of eminent domain to promote economic development. The Court determined that the city’s plan unquestionably served a public purpose, and the takings thus satisfied the public use requirement of the Fifth Amendment.

Although the Court ultimately sided with the city, it stated, “We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose ‘public use’ requirements that are stricter than the federal baseline.”

#### **Related Legislation**

If Proposal 06-4 were approved by voters, Senate Bill 693 and House Bill 5060 could take effect on December 23, 2006. The bills would amend the statute that regulates the acquisition of property by State agencies and public corporations, by adding provisions similar to those in the proposal. Additionally, under the bills, the taking of private property for public use would not include a taking that was a pretext to confer a private benefit on a private entity. House Bill 5060 also describes criteria that property would have to meet in order to be declared “blighted”.